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Filed Mar. 10, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 669.

Citizens' Savings Bank of Owensboro, - Plaintiff in Error,

vs.

City of Owensboro, and A. M. C. Simmons, Tax Collector, - Defendants in Error

BRIEF FOR PLAINTIFF IN ERROR.

J. A. DEAN,
For Plaintiff in Error.

HOWARD PRINTING CO., OWENSBORO, KY.

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 669.

CITIZENS' SAVINGS BANK, OF OWENBORO, ... } . . . *Plaintiff in Error,*

vs.

CITY OF OWENSBORO AND A. M. C. SIMMONS, TAX COLLECTOR, } . . *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Inasmuch as it has been agreed by Counsel in this cause, and ordered by the Court, that the briefs in the other bank tax causes from Kentucky shall be taken and considered as briefs in this cause, we shall not attempt any elaborate argument or citation of authorities, and shall content ourselves with but a brief statement of facts.

The plaintiff in error was chartered for a term of thirty years, by a special act of the General Assembly of the Commonwealth of Kentucky, approved May 12, 1884. This act may be found

in volume 2 of Acts 1883-84 at page 1190, and is printed in full in an appendix to this brief. The seventh section of said act is as follows:

> SEC. 7: "That it shall be the duty of the cashier on the first day of January in each year, to pay into the State treasury, for the benefit of revenue proper, fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus thereon of every kind."

Under the said charter books for the subscription of stock were opened and the requisite stock subscribed, and the bank was organized and began business on the 16th day of February, 1886. In the State of Kentucky many banks were in existence, all operating under charters enacted by special acts of the General Assembly of the State, some passed before, and some after, the Act of February 14, 1856. In some of these charters one rate of taxation was provided and in others another rate—most of them providing for a rate of fifty cents on the hundred dollars, but some providing for only twenty-five cents on the hundred dollars; and in all cases the provision being that said sum should be in full of all taxes—the banks being exempted from local, municipal and county taxation. The question of subjecting banking capital to local taxtion had long been agitated in the State, and it was a mooted question as to the power of the legislature to do this in view of the charter provisions referred to. Under these circumstances it was proposed on the part of the State, to offer to the banks a compromise securing to them immunity from local taxation during the existence of their charters in consideration of their agreeing and binding themselves, in due legal form, to pay to the State seventy-five cents each year on each one hundred dollars of their capital stock, surplus and undi-

vided profits during said time; and in order to carry into effect this compromise what is commonly and popularly known as the "Hewitt" Act was passed by the legislature of the State, and approved by the Governor on the 17th day of May, 1886. Said act constitutes Article II. of chapter 92 of the General Statutes of the Commonwealth of Kentucky and, in full, is as follows:

ARTICLE II.

Stocks in Banks and other Institutions.

SECTION 1. "That shares of stock in State and National Banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county, and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, the Auditor may, at his option, investigate the books of such bank, institution, or corporation; and any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the circuit court of the county wherein said bank, institution, or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution, or corporation is located, institute an action in any court

having civil common law jurisdiction of the amount involved for the recovery of the fine.

SEC. 2. "The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the Auditor of Public Accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths: 'I,————, swear (or affirm) that I am the ————of———— , and that I have, in the foregoing report, truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulations of said————, and how or in what said surplus, undivided profits, or undivided accumulations is invested.'

SEC. 3. If any such bank, institution, or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits, or undivided accumulations than an amount equal to ten per cent. of such capital stock, the excess of the amount so invested over the amount equal to ten per cent. of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating

that such investment was made in good faith, and not for the purpose of avoiding taxation.

SEC. 4. "That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

SEC. 5. "The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

SEC. 6. "This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.

SEC. 7. "If any bank, State or National, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation for

county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 8 of chapter 68 of the General Statutes of Kentucky, referred to in section 6 of the above act, is as follows:

SEC. 8. "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Immediately after the passage and approval of said act, and before the meeting of the next General Assembly, the plaintiff in error duly accepted the provisions of said act, waiving and releasing its right to a lower rate of taxation, under its charter, and paid the taxes therein provided from the passage of said act, and has continued to do so, or offered to do so, to the present time.

On the 28th day of September, 1891, a new Constitution was adopted for the State of Kentucky containing the following provisions:

SEC. 174. "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license or franchise.

SEC. 175. "The power to tax property shall not be sur-

rendered or suspended by any contract or grant to which the Commonwealth shall be a party."

By an act approved November 11, 1892, which is chapter 108 of the Kentucky Statutes, the legislature of the State of Kentucky repealed the revenue law of the State known as the "Hewitt" Act and enacted a law changing the method of taxing banks and greatly increasing the rate of taxation against them by subjecting them to State taxation at the rate levied upon other property and also local, county and municipal taxation. The effect of this was to increase the rate of taxation of the plaintiff in error from seventy-five cents on the hundred dollars to about two dollars and thirty-seven and one-half cents on the hundred dollars.

Tha State Board of Valuation and Assessment having assessed plaintiff in error for taxation for the years 1893 and 1894 under the act of November 11, 1892, and certified the assessment to the clerk of the Daviess County Court, who in turn certified it to the tax collector of the City of Owensboro, said tax collector was proceeding to levy upon and sell the property of plaintiff in error, when, on the 10th day of October, 1894, it instituted this action in the Daviess Circuit Court, seeking to enjoin the collection of said taxes.

The city of Owensboro filed a demurrer to plaintiff's petition and upon hearing the said court sustained the demurrer and dismissed the petition. From this judgment the plaintiff prosecuted an appeal to the Court of Appeals of Kentucky, the highest court of the State, seeking to reverse the judgment of the Circuit Court. Upon hearing on the appeal the said judgment was affirmed; and a writ of error is now prosecuted to this Court, seeking to reverse the judgment of the said Circuit Court and Court of Appeals.

ERRORS.

The errors specially relied upon in this Court are as follows:—

1. "The courts below erred in holding that the Act of the General Assembly of Kentucky, approved May 17, 1886, commonly known as the 'Hewitt' Act, and its formal acceptance by plaintiff in error did not constitute an irrevocable contract between the plaintiff in error and the Commonwealth of Kentucky.

2. "The courts below erred in holding that the repeal of said Act of May 17, 1886, terminated the right of plaintiff in error to immunity from local, municipal and county taxation."

ARGUMENT.

We do not deem it necessary to attempt an elaborate argument of these questions in view of the numerous other arguments made in similar causes now pending in this Court, and especially in view of the fact that by agreement filed in this cause and by order of this Court the briefs for plaintiffs in error in the other bank tax causes are to be considered and taken as briefs for plaintiff in error in this cause.

The power of the legislature of the State to exempt specific property from the general burdens of taxation was long an established doctrine in Kentucky. See Johnson v. Commonwealth, 7 Dana, 339; Citizens' National Bank v. city of Paducah, 10 Ky. L. R. 221; Franklin county v. Deposit Bank, 87 Ky. 212; National Bank v. Covington, 21 Fed. Rep. 484.

In relinquishing its contended right under its charter to a lower rate of taxation and in accepting the higher rate provided in the "Hewitt" Act and in paying said higher rate to the State under said act, the plaintiff in error gave, and the State received, a valuable consideration.

The Court of Appeals of Kentucky had established the doctrine that where a valuable consideration had passed from the grantee to the State the rights acquired under the grant became vested rights in the remaining of the proviso of the Act of February 14, 1856, which is section 8 of chapter 68, of the General Statutes of Kentucky, quoted above, and referred to in the "Hewitt" Act, and this doctrine had become a rule of property in Kentucky, and the subscribers and holders of shares of stock in plaintiff bank purchased in reference thereto, and had the right to rely upon it as a rule of property. See Sinking Fund Commissioners v. Green and Barren River Navigation Company, 79 Ky. 73, decided in 1880, and Commonwealth v. Railroad companies, 95 Ky. 60, decided in 1893.

Under the rule thus established by the highest court in the State, we contend that while the reservation in the "Hewitt" Act gave the legislature the right to repeal that act, it did not give the legislature the right to annul the contracts made under it. That the banks then in existence which accepted the provisions of that act, according to its terms, acquired the right to the immunity provided during the existence of their respective charters, and the attempted abrogation of that right was a violation of the tenth section of Article I. of the Constitution of the United States.

In the various charters of the banks in Kentucky were provisions exempting them from local taxation upon payment of a special rate to the State. This rate, while not the same in all cases, was generally, as in plaintiff's case, fifty cents on the hundred dollars, and this was more than other kinds of property were paying to the State.

It is a matter of common history in Kentucky that at and prior to the passage of the Hewitt law there was a widespread public sentiment in favor of subjecting bank capital to local

taxation. To say the least of it, the power of the legislature to do this was in dispute and in doubt. The power of the legislature to exempt property from taxation and to bargain away the taxing power of the State was established, and regardless of the effect upon subsequent charters of the Act of 1856, there were a number of banks in the state operating under charters, granted prior to that act. The State, desiring to increase its revenues, and at that same time, place all the banking capital of the State on an equality as to taxation, by the passage of the Hewitt law extended to the banks a proposition to set the whole matter at rest during the life of all existing charters by entering into a mutual agreement and contract in the most solemn and binding form, wherein the banks, on their part, should waive their lesser rates and undertake to pay to the State a greater rate of taxation, and the State, on its part, should agree that the banks should be exempt from local taxation during the term covered by the contract. The banks accepted the State's proposition and entered into the contract in solemn form, and filed the same in the archives of the State. Not only this, but the banks paid and have continued to pay the increased rate of taxation. Now comes along the State and claims that the contract was not binding on it. That at its pleasure it could abrogate the contract. That having inveigled the banks into surrendering their tax exemptions, secured to them in their charters, it now had, by a species of legislative legerdermain, the right to tax them at will. The sleight of hand performance by which this is claimed to have been accomplished was the insertion in the "Hewitt" Act of the celebrated sixth section, which is in the following innocent words:

> SEC. 6. "This act shall be subject to the provisions of section 8, chapter 68 of the General Statutes."

The act referred to is what is known in Kentucky as the Act of 1856, and is quoted in full in the statement. By this act charters and grants to corporations are made subject to amendment or repeal "unless a contrary intent be therein plainly expressed."

Now take the fourth section of the "Hewitt" Act and let us see if an intent contrary to the right of the State to amend or repeal is not plainly expressed. Said section is as follows:

> SEC. 4. "That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of its stockholders at a regular or called meeting thereof, may *give its consent* to the levying of said tax, and agree to pay the same as herein provided, and to *waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation*, which *consent* or *agreement* to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such *agreement* and *consent* being delivered and *in consideration* thereof, such bank and its shares of stock *shall be exempt from all other taxation whatsoever* so long as said tax shall be paid *during the corporate existence of such bank.*"

Is this not a contract? Is not the intent to continue this contract during the corporate existence of the banks accepting it, plainly expressed? The banks have entered into a contract with the State wherein they surrender whatever rights or claims they may have had to a lower rate of taxation, and agree and bind themselves to pay a higher rate, in return for which the State undertakes that they shall enjoy immunity from local taxation during the existence of their respective charters. The banks perform their part of this contract, they pay the higher

rate of taxation, and they surrender their charter and constitutional rights to a lower rate. The State accepts the surrender and takes the money and then refuses to perform the only thing that constituted its part of the agreement, viz: to give the banks immunity from local taxation during their corporate existence. Does this not strike the Court as abhorent to good conscience?

It may be asked why was section 6 incorporated in the "Hewitt" Act. To this we think it sufficient to say that it often happens that meaningless provisions are incorporated in statutory legislation. The idea of the retention, on the part of the State, in the act itself, the right to repeal the "Hewitt" Act at its pleasure, and also to abrogate the contracts made under it, and to destroy all the rights acquired under those contracts, is repugnant to the entire aim and scope of the act. This section was doubtless grafted on the original bill as an amendment, and, being considered as meaningless in connection with the plain terms of the bill, was allowed to remain.

On the faith of the rule of property established by the Kentucky Court of Appeals the public have been induced to invest their means in the stock of these banks, and to allow the abrogation of that rule and the destruction of the contract based upon it, would work that species of injury that the Constitution of the United States was intended to prevent in providing against the impairment of contracts.

This plaintiff in error was organized prior to the passage of the "Hewitt" Act under a special charter approved May 12, 1884, and continuing for a period of thirty years. By the terms of its charter, it was required to pay fifty cents on each one hundred dollars of its capital stock in the way of taxation, and was exempted from all other taxation. It accepted, in due form and proper time, the provisions of the "Hewitt" Act, all of which appears by proper averment in the petition. On the faith

of this contract money has been invested, and its abrogation will entail loss and hardships upon those who relied upon the rule of property established by the courts of Kentucky. We think justice as well as the rules of law require the reversal of the judgment in this case, and we so ask.

EQUALITY AND UNIFORMITY OF TAXATION UNDER THE FORMER CONSTITUTION OF KENTUCKY.

Since writing the foregoing, we have been informed that the question was raiseed in the oral argument of these cases in this court as to whether under the former constitution of Kentucky, the doctrine of equality and uniformity of taxation obtained, the idea being, we presume, that if that doctrine did obtain, the legislature of the State had no power to tax the banks against their consent at a higher rate than other property of the same kind, to-wit, money capital, was taxed, and that the consent of of the banks to be thus taxed under the Hewitt law constituted a valuable consideration for the immunity therein guaranteed, and takes these cases out of the class of mere gratuitous exemptions which the State could rescind at pleasure.

We shall endeavor to show that the doctrine of equality and uniformitydid exist, in all its force, under the former Constitution of Kentucky, and was upheld by a long and unbroken line of decisions.

Two provisions in the Constitution of Kentucky in force at the time of the passage of the "Hewitt" Act were held by the courts of that State to secure and guarantee uniformity and equality of taxation. These provisions are Sections 2 and 14 of Article 13, which article is designated the "Bill of Rights," and are as follows:

SEC. 2. "That absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a Republic, not even in the largest majority."

SEC. 14. "No person shall for the same offense be thrice put in jeopardy of his life or limb; nor shall any man's property be taken or applied to a public use without the consent of his representatives, and without just compensation being previously made to him."

The above quotations are from what is known as the third Constitution of Kentucky, which was adopted in 1851. The same provisions were in the second Constitution of Kentucky, and under that Constitution, in 1840, the great leading case establishing the doctrine of equality and uniformity of taxation was decided. This is the case of the City of Lexington v. McQuillan's Heirs, 9 Dana 513. In this case on pages 516 and 517 the court say:

"The power of taxation is in our judgment limited by some of the declared ends and principles of the fundamental law. Among those political ends and principles, equality, as far as practicable, and *security* of property against irresponsible power, are eminently conspicuous in our State Constitution. An exact equalization of the burden of taxation, is unattainable and utopean. But still there are well defined limits within which the practical *equality of the Constitution* may be preserved, and which therefore should be deemed impassable barriers to legislative power *Taxation may not be universal, but it must be general and uniform.* * * * * * * * The legislature, in the plenitude of its power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue for the whole Commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would undoubtedly be the the taking of private

property for public use and which could not be done constitutionally, without the consent of the owner or owners or without retribution of the value in money. * * * * * * * * * * And although there may be a discrimination in the subjects of taxation, still persons of the same class, and property of the same kind, must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky. And this idea, fortified by the spirit of our Constitution, is, in our judgment, comprised by so much of the twelfth section of the tenth article as declares 'nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.'"

This decision has been followed and approved by the Court of Appeals of Kentucky in a long line of decisions from that date down to 1887. See Louisville v. Hyatt 2 B. M. 178; Louisville v. Hyatt 5 B. M 199; Cheaney v. Hooser 9 B. M. 339; Slack v. R. R. Co., 13; B. M. 103; County Judge v. R. R. Co., 5 Bush 229; Bradley v. McAtee 7 Bush 672; Howell v. Bristol 8 Bush 497; C. & O. R. R. Co., v. Barren Co., 10 Bush 613; Preston v. Roberts 12 Bush 586; R. R. Co. v. Com'lth 81 Ky. 501; Barbour v. Louisville 82 Ky. 657; Graham v. Conger 85 Ky. 589; Marshall v. Donovan 10 Bush 683.

Under the Constitution of 1851, under which the Hewitt law was passed, the Court of Appeals of Kentucky, in 1883, decided the case of Cin. N. O. & Texas Pacific R. R. Co., &c. v. The Commonwealth, 81 Ky. 492. On page 501, after quoting the second section of the Bill of Rights, above quoted, the court say:

"The legislature has no such power as to discriminate between the citizens by making one or more assume the entire burden of taxation, and exempt the others. Approximate equality in distributing the burden, and *uniformity* in

the mode of assessment, is the cardinal rule, and as said by this court in the case of the City of Lexington v. McQuillan's heirs, that while taxation may not be universal, it must be general and uniform. *Equality, such as is practicable, is essential to constitutionality of taxation.* * * * * * * * From the case of the City of Lexington v. McQuillan's heirs, decided in the year 1840, and in the intermediate cases including the case of Preston v. Roberts, decided in 1877, this court has *held the rule as to uniformity and equality to be fundamental*, and have gone perhaps as far as any State in the Union in protecting the citizens against oppressive taxation."

This opinion is by Judge Pryor, the able and honored Chief Justice who wrote the opinion in the first bank tax cases under the present law, decided by the Kentucky Court of Appeals.

The Court's attention is called to the fact that in the "Hewitt" Act itself (section 4) there is express legislative recognition that the higher rate of taxation therein provided could not be imposed without the consent of the banks, and so it was provided that they should so consent in writing under seal, &c. The contention now made by opposing counsel that the legislature had the authority to impose upon the banks this higher rate of taxation without their consent is not consistent with the construction the legislature put upon its authority in framing the "Hewitt" Act.

So it will be observed that in entering into the contract under the Hewitt law, the banks did more than surrender the lower rate of taxation provided in their respective charters, and which it is now contended the State had the right to revoke at pleasure, and that in addition thereto they agreed and consented in writing to submit to a greater rate of taxation than the State had the constitutional authority to impose upon them, and thus paid a valuable consideration to the State for the protection promised. This, we submit constitutes such *vested rights* as cannot

be destroyed by the State under the reservation contained in the Act of 1856. The banks purchased from the State this protection from local taxation, as much as they purchased the notes and bills held by them from their customers, and it is as much a violation of the Federal Constitution for the the State to undertake to abrogate one contract as the other.

This distinction, we submit was lost sight of in the decision of these cases by the Kentucky Court of Appeals, and also by Judge Taft in his decision of other cases now in this Court.

But we submit that this distinction is conclusive of the question and, on it, we confidently ask a reversal.

It may be urged that bank stock constitutes a distinct class of property, and that under the former constitution the legislature had the right to tax one class of property higher or differently from another class. But bank stock does not in this sense constitute a separate class of property. It is simply money capital employed in a certain capacity, and does not differ in kind from other money capital. Money employed in running a bank could not be taxed higher or differently from money employed in running a farm or a factory.

Respectfully,

J. A. DEAN,

For Plaintiff in Error.

APPENDIX.

CHAPTER 1412.

AN ACT to incorporate the Citizens' Savings Bank of Owensboro.

Be it enacted by the General Assembly of the Commonwealth of Kentucky.:

SECTION 1. "That there is hereby established a bank of discount and deposit in the City of Owensboro; and the subscribers, their associates, successors, and assigns, shall be a body-politic and corporate, by the name and style of the 'Citizens' Savings Bank;' and shall be capable of contracting and being contracted with, of suing and being sued, of impleading and being impleaded, and of answering and defending, in all courts and places whatever; it may have a common seal, and change and renew the same at pleasure.

SEC. 2. "That said bank may be under the control and direction of three or more directors, to be elected by the stockholders, and shall serve one year, or until their successors shall be elected and qualified. The directors may select, annually, a president from their number. The stockholders may meet and elect the said three or more directors when five hundred shares shall be subscribed, and fifty per cent. thereof paid: J. H. Hickman, J. M. Fetter, E. J. Halsey, J. D. Powers, W. C. Nones, P. T. Watkins, and J. B. Alexander, or any two of them, may, at such time, place, and in such manner as suits their convenience, open books for subscription for the capital stock, which shall be in shares of fifty dollars each; and said corporation may commence business so soon as the said fifty per cent. of five hundred shares have been paid in, and the president or cashier shall have made

oath to the fact of such payment before some judge, justice, or notary.

SEC. 3. "That the directors shall have power to receive subscriptions for so many shares of the stock of said company remaining unsold as they may, at any time, choose to sell; to declare dividends of the profits arising out of the business; and to appoint such officers, agents, and servants as they may deem necessary to conduct the business of the bank, and pay them such sums as wages and salaries, and take from them such bonds to secure the faithful performance of their duty, as they may think reasonable and proper. In case of the death or resignation of any director, the vacancy can be filled by the board of directors. The stock shall be deemed personal property, and shall be assignable only on the books of the bank, upon such rules as the board of directors shall, from time to time, establish; but said corporation shall have a lien on the stock to secure any indebtedness by the stockholder, as principal or otherwise, to said corporation. For the contracts of the corporation each stockholder shall be individually responsible to the amount of stock held by him in said corporation. The capital stock of said bank may be increased, from time to time, to two hundred and fifty thousand dollars, as the president and board of directors may deem advisable and proper, but not to exceed that amount.

SEC. 4. That said bank may transact business as a natural person; may loan money, discount promissory notes or bills of exchange; may buy and sell gold and silver coin, exchange stocks or other securities, and all other evidenceis of indebtedness; and may do a general Banking business, except that it shall not have power to make or issue notes of its own. The promissory notes and the bills of exchange made negotiable and payable at its banking-house, or at any other banking-house, when discounted by this bank, shall be,

and they are hereby, put upon the same footing of foreign bills of exchange; and like remedy may be had thereon, jointly and severally, against the makers, drawers, and indorsers. The said bank shall have the power to make advances on approved securities, upon agricultural products, including growing crops, and upon all manufactures and fixtures as personal property. It may receive in pledge, or as security for money loaned or debts owing it, bonds, stocks, produce and merchandise, United States vouches, certificates or bonds of indebtedness, or the bonds of this or any other State, city, or county, or company incorporated by the United States or any State, and sell the same on the non-payment of the debt or demand by ordinary course of judicial proceedings.

SEC. 5. "That said bank may receive deposits of gold, silver, bank notes, or other notes which may be circulating as money, and repay the same in such manner, at such times, and with such interest, as may be agreed upon with the depositors by special or general contract. Said bank may receive deposits from minors and married women, and the receipts and acquittances of such minors and married women shall be valid.

SEC. 6. "That the said bank may acquire, hold, possess, use, occupy, and enjoy all such real estate, goods and chattels, as may be convenient for the transaction of its business, or to further the objects of its creation, or which may be conveyed to it as surety for any debt, or purchased to aid in the satisfaction of any debt, judgment or decree, and sell and convey the same: and said bank may make such by-laws for their government as they may deem nesessary, provided the same be not contrary to the Constitution and laws of this State or of the United States.

SEC. 7. "That it shall be the duty of the cashier, on the first day of January, in each year, to pay into the State Treasury, for the benefit of revenue proper, fifty cents on each one hundred

dollars of stock held and paid for in said bank, which shall be in full of all tax or bonus thereon of every kind.

SEC. 8. "That if the cashier, or a clerk, teller, or other officer of said bank, shall appropriate any of the funds to his own use, or shall willfully fail to make correct entries on the books of the bank, with intent to cheat or defraud the corporation, or any other person, or to conceal any improper appropriation of funds, the officer so offending shall be deemed guilty of felony, and shall, upon conviction thereof, be confined in the jail and penitentiary of this Commonwealth for a period of not less than two nor more than twenty years.

SEC. 9. "That it shall not be lawful for said bank to issue any note or bill to be passed or used as currency.

SEC. 10. "That this act shall take effect from its passage, and continue in force thirty years."

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JAMES H. McKENNEY
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Brief of Ellis for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Mar. 10, 1899.

No. 669 and the three other Cases heard with it.

Citizens' Savings Bank of Owensboro, Plaintiff in Error.

vs.

City of Owensboro and A. M. C. Simmons, Tax Collector, } Defendants in Error

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BRIEF FOR PLAINTIFF IN ERROR.

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(1) The Constitution of Kentucky, in force at the date of the passage of the Hewitt Act, *required equality and uniformity* of taxation.

(2) The Act of 1856, as uniformly construed by the Court of Appeals of Kentucky, does not apply where the State and the citizen meet on a basis of bargain and consideration.

(3) The Act of November 11, 1892, under which the taxes in these cases are sought to be collected is void for inequality.

J. A. DEAN,
Counsel.

W. T. ELLIS,
Associate Counsel.

HOWARD PRINTING CO., OWENSBORO, KY.

Supreme Court of the United States

OCTOBER TERM, 1898.

CITIZENS' SAVINGS BANK, OF OWENSBORO, ... } . . . *Plaintiff in Error,*

vs.

CITY OF OWENSBORO AND A. M. C. SIMMONS, TAX COLLECTOR, } . . *Defendants in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

The authorities cited herein and the comments based upon them, apply to each of the other three Owensboro Bank Cases with which this case was heard, and I respectfully request that this brief be received and treated as a part of my argument in all four of the cases.

THE CONSTITUTION OF KENTUCKY IN FORCE AT THE PASSAGE OF THE HEWITT LAW IN 1886, REQUIRED UNIFORMITY AND EQUALITY OF TAXATION.

At the oral argument of these cases I insisted that the Constitution of Kentucky in force at the date of the passage of the

Hewitt law, required both uniformity and equality of taxation and that the present Constitution of the State did not establish a new doctrine, or a different rule on this subject from the rule which obtained under the Constitution in force at the date of the passage fo the Hewitt act. I also contended in oral argument and will now try to show that while the previous Constitution of the State of Kentucky did not in words declare that taxation should be uniform and equal, the language of that instrumeut had been uniformly interpreted by the highest court of the State to mean that taxation, in order to be valid, must be equal and uniform.

If this proposition can be successfully maintained, it follows that when the banks contracted with the State to pay a higher rate of tax than was imposed on any other class of property, the agreement became a valid and binding contract because supported by a sufficient consideration, and on this point alone the contention of the banks should be sustained.

Counsel for defendants in error, in their oral argument contended that the rule of equality and uniformity did not obtain under the previous Constitution of the State and that the Legislature had a right to impose an unequal tax burden upon bank capital: hence it was insisted that the State had a right to tax bank capital in excess of the rate of taxation imposed upon other classes of personal property. I will try to point out briefly the accuracy of my contention and the error of opposing counsel on this particular point.

The Constitution of Kentucky in force on the 17th day of May, 1886, which was the date of the passage of the Hewitt law, contains these provisions: Article 13, section 1 of the Constitution of Kentucky adopted in 1850, and which remained in force until 1891, provides:

"That all freemen, when they form a social compact, are

equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."

Section 30 of the same Article provides as follows:

"To guard against the transgression of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of the Government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this Constitution shall be void."

And the latter clause of section 14 of the same Article provides as follows:

"Nor shall any man's property be taken, or applied to public use without the consent of his representatives and without just compensation being previously made to him."

Section 2 of the Bill of Rights declares:

"Absolute arbitrary power over the liberty and property of the citizen exists nowhere in this republic, not even in the largest majority."

The foregoing sections of the Constitution of the State of Kentucky adopted in 1850, except the last section quoted, are identical with the provisions contained in the second Constitution which was adopted in 1799.

These provisions of the organic law of the State have undergone judicial construction time and again and the decisions have always been to the effect that a tax to be valid *must be equal and uniform*.

The first case to which I invite the Court's attention is that of Sutton's heirs v. the City of Louisville, reported in 5 Dana,

28. This was a suit relating to a tax for street improvements, and the Court was, in that case asked to construe the sections of the Kentucky Constitution above quoted, which it did, and held as follows:

> "The object of those fundamental provisions was to preserve, as far as may depend on the practical operations of government, a just equality among all the constituent members of the body politic. And it seems to us that the spirit and end of the Constitution, as thus announced, will be frustrated to some extent, or must be unwarrantably if the judgment in this should be deemed constitutional.
>
> "The assessment against the plaintiffs must be considered either *as a tax on them or as an appropriation of their property to public use without their consent;* and in either of these aspects of it, can it be sustained as consistent with the Constitution?
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> "If it be a tax—is there no limitation on the power of taxation, and has not some constitutional principle been violated? The State Constitution contains no express restrictions on the taxing power. But, nevertheless, this power cannot be, in all respects, arbitrary and unlimited.
>
> "The nature and object of taxation and the spirit and justice of equality which pervades the Constitution and is consecrated by the foregoing first section of the 10th Article necessarily prescribe an *impassable boundary to this*, which, more than any other legislative power, is constantly exercised and felt, and is always liable to be perverted and abused. And that limit is, that a *common burden should be sustained by common contributions, regulated by some fixed general rule, and apportioned according to some uniform ratio of equality.*

In the case of the City of Lexington v. McQuilkan's Heirs, 9 Dana, 516, The Court of Appeals again construed the then Constitution of the State as requiring uniformity and equality.

After deciding that the amount of taxes, whether direct or indirect, ad valorem or specific, were questions confined by the Constitution to the legislative department, the Court says :

> "But in some other respects, and so far as the power of taxation may be effectual without being thus limited, it is in our judgment, limited by some of the declared ends and principles of the fundamental law. Among these political ends and principles, *equality, as far as practicable, and security of property against irresponsible power are eminently conspicuous in our State Constitution.* An exact equalization of the burdens of taxation is unattainable and utopean. But still there are well defined limits within which the practical equality of the Constitution may be preserved, and which therefore, should be deemed *impassable barriers to legislative power.* Taxation may not be universal, but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service ; and, if a tax be laid on land, no appropriated land within the limits of the State can be constitutionally exempted unless the owner be entitled to such immunity in consequence of public service. The Legislature, in the plentitude of its taxing power, cannot have constitutional authority to exact from one citizen or even one county, the entire revenue for the Commonwealth."

The Court in the case supra clearly lays down the rule that a tax on property, to be valid, must be uniform. The Legislature did not possess unlimited power to discriminate, but if it levied a tax on any class of property, that tax to be valid must necessarily be equal and uniform. The tax which the Legislature was levying upon the banks under the Hewitt law was a tax on money, or invisible personal property, and it had no constitutional power to levy a higher rate of tax on the money or invisible per-

sonal property of the banks than it had on the same class of property in the hands of the individual citizen.

Sustaining this view, the Court of Appeals of Kentucky, in Broadway Baptist Church, &c., vs. McAtee, &c., 8 Bush, 513, says:

> "The law making power has always exercised the right without question of determining the proper subjects either of general or local taxation, and we conceive that it is not within the province of the Courts to abridge this legislative prerogative, etc." * * * * * * "When the subjects of taxation have been determined, the constitutional limitation requiring *equality and uniformity* in its imposition upon such subjects applies, and the Courts are bound to see that this limitation is not disregarded."

Again in Howell, &c., vs. Bristol, 8 Bush, 499, the Court says:

> "A law imposing taxation on the general public, the evident intent and legitimate result of which is to equalize the burden so far as practicable, will not be held as violative of the fundamental law merely because that desirable end may not be attained. But when, as in this case, the most probable if not the necessary consequence of the law is to produce the most oppressive inequality, and to compel a small minority of tax-payers to provide at their sole expense an improvement for general utility and public interest, * * * * * * it assumes the character of an attempted exercise of 'arbitrary power' over the property of this minority, etc. * * * * * No such power over the property of the citizen can be constitutionally exercised by any department of our state government; and whenever it is attempted it is the imperative duty of the judiciary to interpose in behalf of those whose constitutional rights are being thereby prejudically affected."

The next case to which I invite the Court's attention, is that of Marshall vs. Donovan, &c., 10 Bush, 691. Beginning with the last sentence at the bottom of this page the Court says :

> "As a general proposition, taxation to be constitutional must be as nearly as practicable *equal and uniform*. To this general rule, however, there are well recognized exceptions. *Where all are alike benefitted by the taxation the burden should be a common one*, but where the benefits are special and peculiar, the contributions may be so laid as to exempt from taxation those persons who are by the law itself excluded from all participation in the advantages which are expected to arise from the system, etc. * * * * It is under this principle of discrimination that assessment for the opening, making, improving, and the repairing of streets, etc. * * * * and like works of *local public utility* are made to depend to some extent upon the supposed benefits which the *local community* * * will receive."

In the case of Preston vs. Roberts, &c., 12 Bush, 585, which was a case involving equality of taxation in the matter of street improvements, the Court says :

> "That there shall be equality, *as far as is reasonably practicable in the distribution of public burdens, whether local or general, is a cardinal principle in the law of taxation, and flagrant departures from that rule ought not to be allowed, unless a more equal distribution is under the circumstances unattainable.*
>
> "The gross inequality in this case appears on the face of the petition : *and as such inequality is violative of a settled rule* that such burdens must be approximately equal, if such equality can reasonably be attained, the inquiry arises whether there is anything in this record presenting for decision the question whether there is inequality, and if so whether this Court has power to correct it."

The Court then proceeds to hold that the inequality complained of appeared on the face of the petition and that the judgment was based upon an assessment which in itself was unequal and for that reason it was erroneous and the assessment void.

In the case of Livingston, &c., vs. City of Paducah, 80th Ky. 656, the question was as to the power of the municipality to levy a special tax upon the owners of vehicles and on which they had paid an ad valorem tax equal to that assessed against other personal property in the city. In passing upon that ques- the Court says:

> "Under any system of taxation that may be devised, an exact equalization of the burdens of taxation is unattainable and eutopian. Approximate equality being all that is practicable, and in many cases, especially where two or more systems of taxation are combined, duplicate taxation results incidently and is unavoidable. It is, therefore obvious that, to declare every tax law invalid because it operates to some extent unequally and incidentally imposes double taxes, would defeat all taxation. * * * * * It is only when statutes are passed which impose taxes on false or unjust principles, or operate to produce gross inequality so that they cannot be deemed in any sense proportioned in their effect on those who are to bear the public charges, that Courts can interfere and arrest the course of legislation by declaring such enactments void."

Then the Court proceeds to hold that in every case where there is an intentional discrimination and where an unequal and an unjust burden is imposed upon one class of property as against the tax imposed upon other classes of property, that such a statute is unconstitutional and void.

In Railroad cases v. the Commonwealth, reported in 81 Kentucky, 492, the railroads insisted that the mode of assessment or valuation of their property for taxation under a certain statute

was in conflict both with the Constitution of the United States and the Constitution of Kentucky in that that it imposed an unequal burden upon the railroads, and in passing upon that complaint the Court of Appeals quoting Mr. Cooley on Taxation with approval says :

> "Certain elements are essential in all taxation. It does not necessarilly follow because the power is so vast that everything which may be done under the pretense of its exercise will leave the citizens without redress, even should there be no conflict with any express constitutional inhibition."

The Court then quotes section 2 of the Bill of Rights which was in force at the date of the passage of the Hewitt act, which is as follows :

> "Absolute arbitrary power over the liberty and property of the citizen exists nowhere in this republic, not even in the largest majority."

Citing this constitutional provision the Court says :

> "The Legislature has no power to discriminate between the citizens, making one or more assume the entire burden of taxation and exempt the others."

The Court then quotes with approval the case of the City of Lexington v. McQuillan's Heirs, already cited, and reaffirms the doctrine of uniformity and equality announced in that case in these words :

> "That there shall be equality, as far as is reasonably practicable, in the distribution of public burdens, *whether local or general, is a cardinal principle in the law of taxation*,

and flagrant departures from that rule ought not to be allowed, unless more equal distribution under the circumstances is *not* attainable."

The cases mentioned above embrace the period from 1838, down to and including 1883. I can state with perfect confidence that under every Constitution of the State from the date of its admission into the Union in 1792, down to the adoption of the present Constitution in 1891, as often and uniformly construed by the highest Court of the State, equality and uniformity of taxation was essential to its validity, if the rate was palpably unequal the tax was void. Any law providing for the assessment of property wherein an intentional discrimination against any class of property is provided for, has always been declared to be void by the Kentucky Court of Appeals.

This brings the Court to the distinct and sharp question: Did the Legislature of the State when it enacted the Hewitt law, possess the power under the Constitution of the State to levy a higher rate of taxation upon money invested in the business of banking than was imposed upon money invested in agriculture, in the various industrial and commercial pursuits, or held as idle capital in the hands of individuals? We answer it did not.

If this is a sound position, when the banks were invited by the State to enter into a contract to pay 75 cents on each $100 of their capital stock, which was 50 per cent. in excess of the rate of taxation fixed upon other moneyed capital of the State, and the same rate on their surplus, as was paid by other property, when the banks accepted that proposition, it became a completed contract based upon a sufficient consideration—a contract from which the State could not retire without the consent of the banks entering into the agreement.

WHAT THE LEGISLATURE UNDERSTOOD AT THE TIME IT PASSED THE HEWITT LAW.

That the Legislature, which enacted the Hewitt law, well understood it had no power to impose upon the moneyed capital of banks a higher rate of taxation than that imposed on money employed in other enterprises, or in the hands of individuals, is perfectly manifest from section 7 of the Hewitt act which provides:

> "If any bank, State or National, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act (that is, assessed as all other real and personal property of the State were directed to be assessed) and the same taxes, State, county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, and undivided accumulations as is imposed on the assessed taxable property in the hands of individuals, etc."

It is clear enough from this section that the Legislature recognized there was a limitation on its powers to tax shares of stock, in banks and that that limitation resided in the then Constitution of the State. If the banks had failed to accept the terms of the contract, as proposed by the State, their shares of stock and surplus would not have been subject to the tax imposed in the Hewitt law, but to the same rate of tax imposed upon all other classes of property subject to taxation, except as they may have been exempt by the terms of their charters. This section 7 is a plain admission on the part of the

Legislature that it was without power to impose the tax proposed in section one of the Hewitt law, unless the consent of the banks to be thus taxed could be obtained. Recognizing this, the law makers, with the greatest particularity, required the banks, with the consent of their stockholders, to enter into the contract, and when they had consented to the agreement they must *consent in writing* which was to be *certified under the corporate seal* of the banks to the Governor of the State.

To argue as defendents in error do, that notwithstanding this the State might withdraw from the agreement at pleasure, is to argue not only that the State is not obliged in good faith to keep its agreement, but to convict the representatives of the State and the banks of having done a vain and foolish thing in entering into the agreement at all.

The Court will not fail to see that the contention of these political corporations now insisting upon the State's right to withdraw from the contract is not only without any equity whatever, but in bad faith and if sustained it would be to encourage parties to violate rather than to perform in good faith their contracts, though entered into in the most solemn form. The banks had the right to rely that the State would, in good faith, perform its agreement, and acting upon that belief they accepted its proposition, and the agreement thus entered into should be carried out.

THE CONSIDERATION FOR THE CONTRACT BETWEEN THE BANKS AND THE STATE.

If there was any valuable consideration moving from the banks to the State in the agreement entered into between the con-

tracting parties, it will be upheld regardless of the adequacy of consideration paid or agreed to be paid. The several elements of consideration entering into the contract between the State and the banks may be stated as follows:

1st. The banks agreed to pay a higher rate of taxation than was imposed on any other property at the date of the passage of the law, and a higher rate than the Legislature could have legally imposed except the banks agreed to pay such rate in consideration that they were to be exempt from local taxation.

2d. The banks contracted with the State that they would continue to pay the rate named in the Hewitt law no more and no less, during the rest of their corporate existence, no matter how low the tax rate on other property might be reduced. They agreed in addition to this to pay the same rate on their surplus that might, from time to time, be imposed on other classes of property. No matter how the tax rate might fluctuate the banks were bound by the rate named in the contract.

3d. Under the contract the banks agreed with the State that the shares of their capital stock, for the purpose of taxation, should remain during the rest of their corporate existence at par. They agreed further that their capital stock, for the purpose of taxation, should continue to be worth 100 cents to the dollar, and they guaranteed that they would keep it at that rate, though the commercial or market value of the stock might decline to 25 cents or even 5 cents to the dollar.

4th. When the contract was executed and delivered they paid on the spot, taxes as provided in section one from the date of the passage of the law, although by the terms of that act other tax payers were not subject to its provisions until after the expiration of one year from its passage.

5th. The banks not only contracted to pay a rate of tax, on their capital stock, 50 per cent. in excess of the rate imposed on

all other classes of property, but they expressly stipulated with the State, if their stock for any cause became worth more than 10 per cent. above its face value, that such excess should be subject to the same rate of taxation as was imposed on other property.

They contracted with the State not only to keep their capital stock at par for the purpose of taxation, but agreed that their capital stock should, at no time, for the purpose of taxation, possess a higher value than 10 per cent. above its par value, and agreed if, from prudent management, or from any other cause the value of their capital stock in the open market should advance more than 10 cents above par, that such excess should be subject to the same rate of taxation as might from time to time be imposed on other classes of property.

If anyone of the foregoing five propositions is true it constitutes an adequate consideration for upholding the contract: that they are all true is, I believe, self evident when considered in connection with the plain terms of the contract itself.

TOMLINSON vs. JESSUP, 15 WALLACE, 454.

The Court of Appeals, in its decision in these cases, relies upon the above case as an authority showing that the Legislature had the right to repeal the contract entered into between it and the banks under the Hewitt law. But a careful examination of the facts of that case will show that so far from being an authority supporting the conclusions reached by the appellate Court, it in no proper sense sustains its conclusions.

The facts in Tomlinson vs. Jessup, briefly stated are:

(1) The Legislature of South Carolina, in 1851, chartered the Northeastern Railroad Company for a term of 50 years.

(2) At that time a general law of the State, passed in 1841, provided that the charter of every corporation subsequently granted and any renewal, amendment or modification thereof should be subject to amendment, alteration or repeal unless the charter "*in express terms exempted it from the operation of that law.*"

(3) The railroad constructed its road and was operating it. In 1855 the Legislature voluntarily, without any consideration whatever, and on its own motion passed an act exempting the railroad from all taxation during the continuance of its charter.

(4) In 1868 the State adopted a Constitution which provided that the property of corporations then existing, or thereafter created should be subject to taxation. Afterwards a statute was passed pursuant to this constitutional provision, which subjected the railroad to taxation. It resisted the collection of the tax on the ground that the act of 1855, which extended to it complete immunity from taxation, was not the subject of amendment or repeal. This Court held that the State, under the general law which was in force at the date of the granting of its original charter, had the authority to repeal the statute under which the exemption was claimed.

Bearing in mind the fact that the act exempting the railroad from taxation was passed after the railroad was a completed and going concern, that it was purely voluntary on the part of the State and that it granted absolute immunity from all taxation to the railroad, the act so exempting the road was but expressive of the *then will of the State* on the subject.

Under the facts of that case, the Legislature would have had the right to repeal the act exempting the road from taxation although there might not have been a general law of the State declaring that all charters and grants should be subject to amendment or repeal. Judge Cooley, in his work on Taxation, page 69, says:

"It is perfectly well settled, however, that an exemption granted from motives of State policy merely, *and where the State and the citizen do not meet on a basis of bargain and consideration, is to be deemed expressive only of the PRESENT WILL OF THE STATE ON THE SUBJECT;* and the law granting it, like laws in general, is subject to modification or repeal, in the legislative discretion, and it is immaterial that while it continued in force parties have acted in reliance upon it."

While this Court held that the Legislature, by reason of the general law, had the power to repeal, I respectfully suggest in view of the authorities cited, the Legislature would have had the right to repeal the act exempting the railroad from taxation at pleasure, because the exemption having been granted "from motives of State policy merely," like all other laws it was the subject of modification or repeal.

Judge Cooley, to sustain the position assumed by him, refers to the case of Baily vs. Maguire, 22 Wallace, 215. The Court will have no difficulty in at once, distinguishing the principals involved in Tomlinson vs. Jessup from the questions involved in the cases at the bar, and will readily perceive that so far from the opinion of the Court of Appeals being fortified by the doctrine of that case, it is in no proper sense an authority sustaining the conclusions reached by the Court of Appeals in these cases.

NEW JERSEY vs. YARD, 95 U. S. 104.

The judgment of the Court of Appeals from which these writs of error are prosecuted is in irreconciable conflict with the doctrine announced in the case supra. The case of New Jersey vs. Yard is in every respect precisely in point with the the cases here except in two points of view which I will mention,

and in these respects the contention of the banks here is more strongly fortified than was that of the railroad in New Jersey vs. Yard.

To bring briefly to the attention of the Court the facts in the New Jersey case in order that a parallel between that and the cases at the bar may be drawn, I state

THE FACTS IN NEW JERSEY vs. YARD.

(1) The Morris & Essex R. R. Co., was chartered by an act of the Legislature of New Jersey, January 29, 1835. The act provided that as soon as the net proceeds of the railroad amounted to seven per cent. on its cost it should pay a State tax of one-half of one per cent. on the cost of the road and no other tax should be levied upon it.

(2) A section of the charter provided that the Legislature had the right to amend or repeal the act whenever it should think proper.

(3) The act was amended March 2, 1836, and the right to amend or repeal was again reserved.

(4) February 14, 1846, the Legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856 relied on in these cases.

(5) On the 23d of March, 1865, the charter was again amended authorizing the railroad to build a branch road and all the rights of the original and amended charters and all franchises therein conferred were embodied in the supplemental act. By the third section of this supplemental act it was provided that it should not go into effect or become binding until the company, in writing under its corporate seal filed in the office of the Secretary of State, accepted the act and this it was required to do

within 60 days after the passage of the law. The company accepted the act within the time limited.

(6) There was nothing said in this supplemental act about the right to amend or repeal the charter, but the general law of the State declaring that all charters should be the subject of amendment or repeal, unless the contrary was expressly stated in the charter, was in full force, hence there was no necessity for reserving the right to repeal in the charter itself.

(7) Afterwards the Legislature of New Jersey passed acts imposing a more burdensome tax on the railroad than that provided in the original and amended charters.

The railroad resisted the collection of this additional tax and the single question was, did the railroad, by the acceptance of the act of 1865, enter into a contract with the State which could not thereafter be repealed during its corporate existence and this Court held that the contract was irrepealable.

The Court said:

> "We have already said since the Legislature which passed the act of 1865, had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, did they intend to make such contract?"

The Court answered this question in the affirmative, and proceeds in the opinion to discuss the fact of the State's having required the railroad to enter into a written agreement and concludes, that in view of all of these formalities it would be absurd to say that the State was making a contract with the railroad which it might thereafter repeal at pleasure, and so held that the contract was irrevocable.

THE TWO POINTS OF DIFFERENCE BETWEEN THE NEW JERSEY CASE AND THE CASES AT THE BAR.

There are just two points of difference between the New Jersey case and the cases at the bar, and they are

(1) The railroad in the New Jersey case, as far as the record shows, did not agree to pay a higher rate of tax than was imposed on other property, while the banks in these cases did.

(2) In the New Jersey case the right to alter, amend or repeal the charter was not reserved in the charter itself, but was reserved in the general law, while in these cases the right under certain conditions is reserved, in the act.

The contention of the banks in the cases at the bar is stronger than that of the railroad, in this that they expressly agreed to pay a higher rate of tax than was imposed on other classes of property, while the railroad did not, but on the contrary it was exempted from all taxes until its net earnings amounted to seven per cent. The banks were required to pay taxes regardless of their net or gross earnings.

The fact that the right to amend or repeal the charter in the New Jersey case was not incorporated into the charter itself cuts no figure whatever, because the right to amend, alter or repeal was conferred in the broadest terms by the general law itself. The Hewitt act would have been as much the subject of repeal with section 6 entirely omitted as it is with that section inserted. Section 6 of the Hewitt law conferred no other or greater right on the Legislature to alter, amend or repeal the act than it would have had under the general law with section 6 wholly omitted, and this fact is fully recognized in the opinion of the Court of Appeals in these cases.

If the doctrine announced in New Jersey vs. Yard correctly states the rule of law, it is an authority, as I insist, absolutely conclusive of the question of the Legislature's right to tax the the banks in any other mode than that prescribed in the Hewitt act.

A CORRECT READING OF THE HEWITT LAW WITH SECTION 8, CHAPTER 68, GENERAL STATUTES, INCORPORATED INTO SECTION 4 OF THE HEWITT ACT.

The Court will observe that the sixth section of the Hewitt act simply declares that "this act shall be subject to the provisions of section eight (8) chapter sixty-eight (68) of the General Statutes." When the Court examines section eight of chapter sixty-eight, General Statutes, it will at once discover that it cannot pick up that section bodily and anchor it into the Hewitt law. To do so would be to violate the elementary principals that obtain in the construction of the simplest sentences written in the English language. The Court will, therefore, be obliged to insert section eight, chapter sixty-eight General Statutes into the Hewitt law in such fashion as will make the whole act intelligable and at the same time give section eight, the benefit of its full and fair meaning.

I will try to incorporate into section four of the Hewitt act section eight, chapter sixty-eight, so as to make an intelligent reading of the whole. Beginning with section four of the Hewitt law, according to my construction the two sections taken together read as follows:

"That each of said banks, institutions and corporations, by its proper corporate authority, with a consent of a majority

in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky, shall be evidenced by a writing under the seal of such bank, and delivered to the Governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as the tax shall be paid during the corporate existence of such bank.

"But any privileges or franchises (if any) that may be granted the banks by this act shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent is plainly expressed: Provided that whilst privileges and franchises so granted (if any) may be amended or repealed, no amendment or repeal shall impair any vested rights acquired under this act."

There must be some such reading of the two sections as this, otherwise it is impossible to correctly arrive at their true meaning.

Did the Legislature mean by incorporating this act of 1856 into the Hewitt act to declare dogmatically the contract between the State and the banks should be repealable at the pleasure of the State? Did it mean after the contract was signed, sealed, delivered and accepted, the State might the next hour or the next day over the protest of the banks annul the contract? Most certainly not, and yet, this is precisely what opposing counsel are insisting on in these cases.

If the Legislature had so intended it would have been the easiest and simplest thing imaginable to have written in the law "the State shall have the right at any time to repeal this act and annul the contract." The Legislature understood the Eng-

lish language, and if it had intended that the contract should be revokable at the will of the State it would have been so written in law.

Considering the subject with which the Legislature was dealing, the object to be attained, the fact that a greater tax burden was being imposed on money employed in banking than was imposed on any other [redacted] property, the fact that the banks were required to enter into the contract with the greatest minutness of detail and in the most solemn form, points irresistably to the conclusion that the Legislature understood it was making a binding contract and that such was the legislative intent. All this plainly appears on the face of the act.

In view of a uniform line of decisions by the Kentucky Court of Appeals construing the Act of 1856 and which I here cite there is I think, no room to doubt that the agreement entered into between the State and the banks constitutes an irrevokable contract.

DECISIONS CONSTRUING ACT OF 1856.

Sage v. Dillard 15th B. M. 340.

Baldwin v. Comrs Sinking Fund 11th Bush.

Comrs. Sinking Fund v. Green and Barren Nav. Co. 79th Ky. 73.

Franklin Co. Court v. Banks 87th Ky. 370.

Commonwealth v. Railroads 95th Ky. 75.

Commonwealth v. Banks 97th Ky.

A reversal of the judgments in all these cases is asked.

Respectfully,

W. T. Ellis,

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